Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1328

WANDA JUNE WEEKS, ET AL., and
DOROTHY FRAZIER and RUTH RATTLER, ET AL.,
Appellants,

VERSUS

THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

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Appellees, Absentee Delaware Tribe of Western Oklahoma Business Committee, et al., pursuant to Rule 16 of the Rules of this Court, move to dismiss the appeal docketed by appellants, Wanda June Weeks and Dorothy Frazier and Ruth Rattler, on the grounds that the District Court was without proper jurisdiction of the parties or the subject matter under 28 U.S.C. 1331(a) because the question presented by appellants is a challenge to congressional determination of membership in two federally recognized Indian tribes, as such membership is defined for a particular statutory purpose, to-wit, payment of a judgment of the Indian Claims Commission and is, therefore, nonjusticiable under controlling decisions of this Court; that the Absentee Delaware Tribe of Western Oklahoma is an indispensable

party to this cause and is immune from suit without congressional authorization, which has not been given; that the District Court improperly assumed jurisdiction of this question; that this Court is, thus, without proper jurisdiction under 28 U.S.C. 1252; and, therefore, that this appeal should be dismissed.

In the alternative, appellees move that the final judgment of the District Court upholding the constitutionality of 86 Stat. 762, 25 U.S.C. 1291-1297, insofar as this statute includes the statutorily-defined membership of the Absentee Delaware Tribe of Western Oklahoma within its provisions, be affirmed, on the ground that the District Court gave full and complete consideration to appellants' arguments prior to finding them to be without merit; that the decision of the District Court is—on the merits—consistent with all decisions of this Court; and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to warrant plenary review by this Court.

STATEMENT

This is a direct appeal from the final judgment entered on December 18, 1975, by a three-judge panel of the United States District Court for the Western District of Oklahoma, specially constituted pursuant to 28 U.S.C. 2282, upholding the constitutionality of 86 Stat. 762, 25 U.S.C. 1291-1297, insofar as this statute included the statutorily-defined members of the Absentee Delaware Tribe of Western Oklahoma within its distributive provisions.

In 1951, the Absentee Delaware Tribe of Western Oklahoma filed a claim before the Indian Claims Commission

seeking recompense for breach by the United States of the provisions of the Treaty of May 6, 1854, between the United States and the Delaware Tribe. 10 Stat. 1048. A similar claim was filed before the Indian Claims Commission by the Delaware Tribe of Oklahoma. The Commission assigned the Absentee Delaware Tribe's petition Docket No. 27A, and the Delaware Tribe's petition was assigned Docket No. 241. Thereafter, the two dockets were consolidated by the Indian Claims Commission and numerous legal questions, including whether the Absentee Delaware Tribe was a real party in interest, were litigated on the motion to dismiss of the United States. The Commission upheld appellees' real party in interest status and directed the case to go forward on the merits. *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 2 Ind. Cl. Comm. 253 (1953). The United States appealed to the Court of Claims, which affirmed the Commission's judgment and specifically ruled upon essentially the same question appellants present here. *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 130 Ct.Cl. 782, 787-789, 128. F.Supp 391, 398-399 (1955). After much further litigation, including six decisions by the Indian Claims Commission,[1] a Final Award was entered by the Commission and

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[1] *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 3 Ind. Cl. Comm. 622 (1955); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 4 Ind. Cl. Comm. 346 (1956); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 8 Ind. Cl. Comm. 150 (1959); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 9 Ind. Cl. Comm. 1 (1960); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 21 Ind. Cl. Comm. 18 (1969).

See also the decision of the Court of Claims in *United States* v. *Delaware Tribe and Absentee Delaware Tribe of Oklahoma*, 192 Ct.Cl. 906, 427 F.2d 1218 (1970).

reported to Congress. The Final Award entered by the Commission in Dockets 72 and 298 (consolidated) named as petitioners the Absentee Delaware Tribe of Oklahoma and the Delaware Tribe of Indians.[2]

Following lengthy hearings before the House and Senate Indian Affairs subcommittees, Congress enacted 86 Stat. 762, 763, 25 U.S.C. 1291-1297 as the vehicle for distribution of this Final Award. The statute designates as the beneficiaries of the judgment defined members of the Delaware Tribe of Oklahoma and the Absentee Delaware Tribe of Western Oklahoma, each of whose tribal governing bodies receive ten per cent of the proportionate amount appropriated to their statutorily-defined membership. 25 U.S.C. 1294.

In 1973, appellant filed her complaint alleging that the terms of the statute were invidiously discriminatory because appellants were, by force of the Constitution, entitled to all funds appropriated, or which might be appropriated, to pay the Final Award entered by the Indian Claims Commission. The District Court entered a restraining order, after notice to the parties, on September 5, 1973. A preliminary injunction was entered, after notice and hearing, on March 21, 1974. The contentions of the appellants were extensively briefed and argued before the court below on appellees' motion to dismiss, appellants' reply thereto, cross-motions for summary judgment, and a special brief devoted exclusively to the question of the rationality of statute, filed pursuant to an order of the court below.

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[2] 21 Ind. Cl. Comm. 344.

On November 1, 1974, the District Court overruled the motion to dismiss as to the Federal defendants, and the named tribal defendants,[3] certified the litigation as a class action consisting of the appellant class, composed of descendants of certain members of the Delaware Tribe who had resigned from the Tribe, renounced Delaware citizenship, taken United States citizenship, and taken individual allotments of land in fee, pursuant to an 1866 treaty between the United States and the Delaware Tribe,[4] and the appellee Absentee Delaware Class consisting of the statutorily-defined members of the Absentee Delaware Tribe of Western Oklahoma, to-wit, those whose names were on, or eligible to be on, the 1940 constructed base roll of the Absentee Delaware Tribe.[5]

Thereafter, the District Court received the above-referenced briefs in support of cross-motions for summary judgment, considering in detail all issues between appellants and appellees and, *sua sponte*, ordered additional briefs devoted to the rationality of the distribution statute here at issue.

After receipt of these briefs, the District Court, during the course of one-day trial, received into evidence all documentary exhibits and evidence which appellants contended would support their claims, and ordered the parties to file proposed findings of fact and conclusions of law. On December 18, 1975, six months after the proposed findings and conclusions were filed, the District Court entered its

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[3] The United States was dismissed *eo nomine*.

[4] Treaty of July 1, 1866; 14 Stat. 793.

[5] 86 Stat. 762; 25 U.S.C. 1292.

final judgment unanimously rejecting appellants' contention that their class, alone, was, by command of the Constitution, entitled to receive all funds which Congress had distributed in 86 Stat. 762, 25 U.S.C. 1291-1297, and granting judgment for the defendant classes on this issue.

ARGUMENT

The unanimous decision of the District Court is plainly correct—on the merits—and the arguments advanced by appellants are so obviously unsubstantial as clearly not to warrant plenary consideration by this Court. Congress, by the statutory scheme appellants assail as unconstitutional, distributed two long-litigated Dockets adjudicated by the Indian Claims Commission. Appellants contend here, as they contended below, that Congress could not include anyone other than appellants in the distribution statute without violating the Constitution. Appellants' theory that the parties whom the Indian Claims Commission and the Court of Claims found to be real parties in interest entitled to prosecute the claims to judgment, on behalf of their respective entities, must be ignored in distribution of the award which they litigated for two decades has a singular status: novelty. Never in the history of the federal courts has a statute regarding the composition of statutorily-defined membership in an Indian tribe been vitiated by a federal court sitting in review of Congress' plenary power over Indian affairs. *See, e.g., Lone Wolf* v. *Hitchcock*, 187 U.S. 553; *Simmons* v. *Eagle Seelatsee*, 244 F.Supp. 808 (E.D. Wash.) *affirmed*, 384 U.S. 209. Certainly, never has the Judiciary, invoking the Due Process Clause, intimated that

a distribution plan enacted by Congress—after lengthy hearings and full consideration of the record developed over the course of twenty years by the Indian Claims Commission and the Court of Claims—is to be set aside on a blinkered version of history, put before a district court by dissatisfied litigants who wish to claim the fruits of the statute for their benefit. The court below unanimously rejected appellants' contention that the distribution statute was irrational in its inclusion of appellees. This conclusion is plainly correct and—on its merits—should be affirmed. Additionally, however, the District Court's judgment should be vacated since that court did not, as Chief Judge Daugherty pointed out below, (App. p. 84) possess proper jurisdiction to decide the nonjusticiable issues appellants raised, nor did the District Court possess proper jurisdiction over appellees as party defendant.

I.
DISMISSAL

(a) Nonjusticiability:

The District Court should have dismissed this action on the authority of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565-568, and the mass of federal case law which has been built upon that landmark decision. Appellants' assertion that their complaint is outside the rule of *Lone Wolf* because they are not challenging the composition of an Indian tribe's membership is refuted by appellants' own assertions, both to this Court and in the court below. Appellants assert that the proper membership of the entire Delaware Nation *for purposes of the statute here at issue, i.e.*, for payment

of the judgment in Indian Claims Commission Dockets 72 and 298, must, by force of the Constitution, be defined so as to be limited to them alone. Appellants further contend, as they contended unavailingly in the court below, that tribal membership, for purposes of this statute, has been wrongly defined and, therefore, excludes them. This is precisely the sort of complaint which has invariably been held nonjusticiable. *Lone Wolf* v. *Hitchcock, supra,* 187 U.S. 553, 565-568. See also, *e.g., Martinez* v. *Southern Ute Tribe,* 249 F.2d 915 (10th Cir., 1957); *Groundhog* v. *Keeler,* 442 F.2d 674 (10th Cir., 1971); *National Indian Youth Council* v. *Bruce,* 485 F.2d 97 (10th Cir., 1973); and *Tewa Tesuque* v. *Morton,* 498 F.2d 240 (10th Cir., 1974). While the District Court reached the correct result on the merits here, this does not alter the fact that the District Court did not have proper authority to adjudicate a question this Court has held to be nonjusticiable.

(b) Immunity:

The District Court should have dismissed appellants' complaint because the Absentee Delaware Tribe of Western Oklahoma was an indispensable party to this action, see, *e.g., Tewa Tesuque* v. *Morton, supra,* 498 F.2d 240, 242 (10th Cir., 1974), and, under this Court's explicit holding in *United States* v. *United States Fidelity and Guaranty Company,* 309 U.S. 506, 512-513, "Indian Nations [such as the Absentee Delaware Tribe] are exempt from suit without congressional authorization." Appellants attempted to avoid this Court's holdings by omitting the name of the tribal entity as a party defendant, which, obviously, can make no difference when, as here, the Tribe is an indispensable

party, *United States* v. *United States Fidelity and Guaranty Company, supra; Tewa Tesuque* v. *Morton, supra;* by asking a declaratory judgment against the defendant classes, *i.e.*, the statutorily-defined tribal membership, and by seeking injunctive relief only against the Secretary of the Interior who, by fortuity, had not paid out the funds which plaintiffs wished to claim for their own, on the date the suit was filed. This, appellants could not properly do since the Tribe was an indispensable party and "may not be joined without its consent or the consent of Congress in light of its quasi-sovereign status." *Tewa Tesuque* v. *Morton*, 498 F.2d 242. Therefore, the entire judgment of the District Court should be vacated for want of jurisdiction and remanded with instructions to dismiss.

II.
AFFIRMANCE

Apart from the jurisdictional question, the result reached by the District Court on the merits is so plainly correct and the contentions put forward in appellants' Jurisdictional Statement so clearly unsubstantial that the portion of the judgment below which appellants bring here should be summarily affirmed. Appellants argue here, as in the court below, that they possess a unique historical status which disables Congress from enacting legislation to pay this Claims Commission judgment to anyone but them. Specifically, appellants allege unconstitutionality in Congress' decision to treat the Absentee Delaware Tribe of Western Oklahoma as a party in interest to this judgment, on the ground that the Absentee Delaware tribal members

are descendants of Delaware tribal members who were not "with" the Tribe at "the time of the wrong" and who may not, therefore, share in the judgment. This contention, previously rejected by the Indian Claims Commission and the Court of Claims when substantially the same issue was before those tribunals, 2 Ind. Cl. Comm. 253 (1953), *affirmed on this issue*, 130 Ct.Cl. 782, 788-789, 128 F.Supp. 391, 398-399 (1955), and rejected by Congress, and the court below, gains no stature with repetition. The Indian Claims Commission, the Court of Claims, Congress and the unanimous court below, correctly realized that the presence of a particular tribe of the Delaware Indian Nation on a particular area of land at a particular point in time was an irrelevant issue, since, unlike some Indian tribes,[6] the Delaware Nation had never incorporated any concept of territoriality into its tribal law. Rather,

> "the rule and policy of the Delawares at that time [1854] was and has been to recognize all Delawares everywhere, who had maintained their identity as Delawares, as members of the Tribe . . . If, therefore, the alleged wrong had been actionable at the time it occurred, the absent members of the Tribe would have been entitled to share in the recovery."

Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma v. *United States*, 130 Ct.Cl. 782, 788-789, 128 F.Supp. 391, 398-399 (1955) *affirming on this issue*, 2 Ind. Cl. Comm. 253 (1953). Thus, however broadly or narrowly the Treaty of 1854 is read, *but cf., Northwestern Shoshone Tribe* v. *United States*, 324 U.S. 335, 354 (Jackson, J., con-

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[6] *E.g.*, the Cherokee Indians. *See, Eastern Band of Cherokee Indians* v. *United States*, 117 U.S. 288 discussed in, F. Cohen Federal Indian Law, pp. 477-478 (Rev. Ed., 1958).

curring),[7] it is patent that no question of constitutional proportions is presented by appellants' challenge to this statute. The Senate Report which accompanied the legislation appellants assail through Congress, summarizing the lengthy findings of the Indian Claims Commission and the Court of Claims, correctly remarks that: "[t]he Delaware Nation was geographically scattered, but there was actually a strong inner cohesion. Lines of communication were stretched thin, but did not break." Senate Report No. 1518, 90th Cong. 2d Sess. p. 10. And, as the court below held, "this view is persuasive, and . . . Congress also was entitled to consider it in drawing the distribution statutes, along with the other historical evidence." App. p. 62 (opinion of the Court). And:

> "[t]he so-called Kansas Delawares stayed in Kansas, individually took an allotment of tribal land in Kansas in fee with power of alienation [and individually took other valuable benefits not available to Delaware tribal Indians] This most significant turn of events affords a rational basis for the Congress to distribute the award recommended by the Commission regarding tribal lands to these recognized Delaware Tribes [Delaware Tribe of Oklahoma and Absentee Delaware Tribe of Western Oklahoma], and to those on the rolls of these recognized Delaware Tribes."

App. p. 87 (Daugherty, J., dissenting in part).

Appellants suggest, without saying, that the holdings of the Indian Claims Commission and the Court of Claims

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[7] As Mr. Justice Jackson observed, Indian treaties with the United States present a sociological issue rather than a question of pure legal interpretation: "The treaty [with the Northwestern Shoshone Tribe] was a political document. It was intended to let the whites travel in peace a road they were going to travel anyway." *Id.*

in *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States, supra,* are inconsistent with this Court's decision in *Eastern Band of Cherokee Indians* v. *United States, supra.* Appellants are wrong. The very language which appellants cite: "If Indians wish to enjoy the benefits of the common property of the Cherokee Nation, . . . they must, . . . comply with the constitution and laws of the Cherokee Nation, and be re-admitted to citizenship as there [in the Cherokee constitution] provided. . . ." 117 U.S. 288, 310, demonstrates that *Eastern Band* turned on an interpretation of the "constitution and laws of the Cherokee Nation," while the decision in *Delaware Tribe and Absentee Delaware Tribe of Oklahoma* v. *United States, supra,* turned on "the rule and policy of the Delawares." 130 Ct.Cl. 782, 788, 128 F.Supp. 391, 399. The internal rules of the Cherokee Nation and the internal rules of the Delaware Nation were, simply, different. The Constitution does not require Congress to treat exactly alike those things which are different in fact. *Railway Express Agency* v. *New York,* 336 U.S. 106, 110; *Jefferson* v. *Hackney,* 406 U.S. 535, 545.

Moreover, even if *Eastern Cherokee, supra* and *Delaware Tribe, supra* were not factually distinguishable, it would avail appellants nothing. Both cases involve decisions under broad Acts of Congress specifically granting to the Judiciary the general jurisdiction to decide particular Indian claims on their particular merits. Neither suggests that its result is commanded by the Due Process Clause and neither suggests that Congress would be constitutionally disabled from differing with the decision should Congress, upon its own examination of the facts, elect to do so.

No case in this Court so suggests, even in regard to a prior decision of this Court expressly grounded upon the Constitution itself. *See, Katzenbach* v. *Morgan*, 384 U.S. 641, upholding congressional revision of this Court's constitutional holding in *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45.

A fortiori, the rule is the same when the courts are merely interpreting a very broad congressional enactment such as the general jurisdiction-granting statutes under which *Eastern Band, supra*, and *Delaware Tribe, supra* were brought. *Cf., Kent* v. *Dulles*, 357 U.S. 116, 128-129.

And it needs no argument to demonstrate that, appellants to the contrary notwithstanding, all the facts put into evidence before the Indian Claims Commission, the Court of Claims, and Congress, need not have been reintroduced into evidence before the court below in order to uphold the constitutionality of the statute. The power of Congress to legislate is not straitjacketed by the size of the evidentiary record accumulated, *post facto*, before a District Court to justify Congress' decision. *See, Richardson* v. *Belcher*, 404 U.S. 78, 84:

> "We have no occasion within our limited function under the Constitution . . . to judge for ourselves whether the apprehensions of Congress were justified by the facts."

In any event, the findings of the Indian Claims Commission and the decision of the Court of Claims are judicially noticeable without reintroduction of the evidentiary records before those tribunals. 25 U.S.C. 70t. *Cf., United States* v. *Southern Ute Tribe*, 402 U.S. 151 *and, Rowan* v. *United States Post Office Department*, 397 U.S. 728.

The holding of the unanimous court below that appellants had raised no constitutional issue, let alone a constitutional issue sufficient to vitiate this Act of Congress, was fully supported by the evidence before the court, the evidence before Congress and the detailed history of the Absentee Delaware Tribe explicated by the Indian Claims Commission and the Court of Claims, and transmitted to Congress pursuant to 25 U.S.C. 70t. The decision below is plainly correct and conflicts with no decision of this Court. It is in accord with all decisions of this Court which have—pursuant to specific statutory authority—reached the merits of such an Indian claims case, including *Eastern Band of Cherokees* v. *United States, supra*. Thus, even assuming the decision below should not be vacated in its entirety and remanded with instructions to dismiss, it should, at the very least, be summarily affirmed.

One collateral point deserves mention. Appellants' quite candid attempt at bootstrapping through noting that appellees here, as well as the Secretary of the Interior, have noticed appeal to this Court from so much of the decision of the majority below as holds that Congress was *constitutionally required* to partially *include* appellants in the terms of this distribution statute, and suggesting that probable jurisdiction should be noted as to all appeals if it is noted as to any, is without merit. The decision of the majority below, insofar as it holds appellants have a constitutional right to be included in the terms of the distribution statute here at issue, and enjoining the statute's operation, presents a holding of first impression and of extraordinary importance in Federal Indian law. Probable jurisdiction should be noted as to the appeals from this

portion of the District Court's judgment for the reasons set forth in the Jurisdictional Statements of the appealing parties who were defendants below.

Per contra, it is clear that no substantial constitutional question warranting plenary review in this Court is presented by the District Court's entry of judgment for appellees in regard to the issue which appellants here present.

CONCLUSION

For the reasons, and upon the authorities above cited, it is submitted that this appeal presents no issues warranting plenary review in this Court and that the judgment of the unanimous court below on these issues should be either vacated and remanded for want of proper jurisdiction in the court below, or, alternatively, should be summarily affirmed.

Respectfully submitted,

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April, 1976

CERTIFICATE OF SERVICE

I, Bernard J. Rothbaum, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I did, on this ___ day of April, 1976, mail, postage prepaid, three true and correct copies of the above and foregoing Motion to Dismiss or Affirm to: Mr. Delmer L. Stagner, Suite 700, 101 Park Avenue Building, Oklahoma City, Oklahoma 73102; Mr. John G. Ghostbear, 340 Arcade Building, Tulsa, Oklahoma 74103, and Mr. Henry B. Talliaferro, Jr., 315 Connecticut Avenue, Washington, D.C. 20006, counsel of record for appellants Wanda June Weeks, Dorothy Frazier and Ruth Rattler; I further certify that I did, on this ___ day of April, 1976, mail, postage prepaid, three true and correct copies of the foregoing Motion to Dismiss or Affirm upon the Solicitor General, United States Department of Justice, Washington, D.C. 20005; I further certify that I did on this ___ day of April, 1976, mail, postage prepaid, three true and correct copies of the above and foregoing Motion to Dismiss or Affirm to all counsel of record for all appellees; I further certify that all parties required to be served have been served, in conformity with Rule 33 of the Rules of the Supreme Court.

Bernard J. Rothbaum, Jr.